

Countryman, Ryan

From: Gilbert, Toni <ToniGilbert@dwt.com>
Sent: Thursday, February 13, 2020 12:59 PM
To: MacCready, Paul; Countryman, Ryan
Cc: Graham, Clayton; Friedmann, Josh
Subject: Height Variance Letter
Attachments: Height Variance Letter.pdf

CAUTION : This email originated from outside of this organization. Please exercise caution with links and attachments.

Hello Messrs. MacCready & Countryman –

Attached please find a copy of the correspondence from Clayton Graham. A hard copy is being mailed to you today as well.

Thank you,

Toni Gilbert | Davis Wright Tremaine LLP
Executive Legal Assistant to: Clayton Graham, Brian Hulse, Janet Murphy
Yuping Wang, Norm Page, Don Percival & Josh Friedmann
920 Fifth Avenue, Suite 3300 | Seattle, WA 98104
Tel: (206) 757-8828 | Fax: (206) 757-7700
Email: tonigilbert@dwt.com | Website: www.dwt.com

Anchorage | Bellevue | Los Angeles | New York | Portland | San Francisco | [Seattle](#) | Washington, D.C.

“My mission in life is not merely to survive, but to thrive; and to do so with some passion, some compassion, some humor, and some style.” – Maya Angelou

Happy Black History Month!

February 13, 2020

Via Email and U.S. Mail

Snohomish County Planning and Development
Attn: Paul MacCready and Ryan Countryman
3000 Rockefeller Avenue
Everett, WA 98201
paul.maccready@snoco.org
ryan.countryman@snoco.org

Re: Height Variance Application Nos. 11-101457-002-00 VAR and 11-101457-003-00 VAR, filed in connection with BSRE Point Wells proposal (File No. 11-101457 LU)

Mr. MacCready and Mr. Countryman:

This letter provides comments on behalf of our clients, Mary and Joseph Bundrant, on the above-referenced height variance applications (the “Applications”). The Bundrants, as longtime community members and immediate neighbors to the Point Wells site (the “Site”), still have grave concerns with the developer’s haphazard approach to the larger Point Wells project and these Applications alike. This letter provides comments on both Applications.

Under the Snohomish County Code (the “SCC” or “Code”) a variance may be granted *only* upon the full satisfaction of four legal criteria set forth at SCC 30.43B.100. The Applications fail to satisfy any of these criteria, so they should be denied by the County.

1. The Applications fail to show the required *special circumstances* that are not present throughout the vicinity and zone.

The Code first limits variance eligibility to instances of “special circumstances applicable to the subject property or to the intended use, such as size, shape, topography, location or surroundings, that do not apply generally to other properties or classes of use in the same vicinity and zone.” SCC 40.43B.100(1). Neither of the Applications satisfy this criterion, because neither even attempts to show any special circumstances that are not present throughout (and indeed, characteristic of) of the entire vicinity surrounding the Site.

The first Application, numbered 11-101457-002-00 VAR (“Application 1,” or “App. 1”) identifies four characteristics of the Site: its setbacks, the shoreline, the railroad right-of-way, and the steep wooded hillside. Each of these geographic features is not only present throughout the vicinity and the zone – they are *characteristic* of the vicinity and zone. Similarly, the second Application, numbered 11-101457-003-00 VAR (“Application 2,” or “App. 2”) references the railroad, hillsides, and BNSF’s vertical clearance

4834-9231-4033v.2 0099997-000001

requirement, which is similarly present throughout BSNF's right of way, which runs by many properties in this area. Neither Application describes any Site or use characteristic unique to this property or use class, and the first required criterion is unsatisfied.

2. The Applications fail to show the required *substantial property right or use possessed by other properties in the same vicinity and zone*.

The Code's second required criterion is that variances must be "necessary for the preservation and enjoyment of a substantial property right or use possessed by other properties in the same vicinity and zone but which because of special circumstances is denied to the property in question." SCC 40.43B.100(2). Neither of the Applications satisfy this criterion, because neither names or even attempts to name any impairment to a "substantial property right or use *possessed by other properties in the same vicinity or zone . . .*" *Id.* (emphasis provided).

Even if the identified "right of being able to develop the property pursuant to its vested zoning" (App. 1) is a "substantial property right or use" within the meaning of the Code—a dubious legal proposition at best—the Code specifically requires that the property right or use in question must be "possessed by other properties in the same vicinity and zone."

Neither Application makes any attempt to identify any property right or use possessed by even a single other property in the same vicinity or zone. In fact, each facially admit that this criterion is not, and cannot, be satisfied. The Applications do so by stating that "[t]he Point Wells site is the only property in the area which has vesting as an Urban Center with the substantial property right of being able to be developed as such," (App. 1) and that this purported right "does not apply to other properties in the vicinity" (App. 2). This highlights the fact that the Applications do not, and cannot, satisfy this criterion.

3. The Applications fail to show that the proposed heights will not be *injurious to other properties in the vicinity and zone*.

The Code's third required criterion is that no variance may be "materially detrimental to the public welfare or injurious to the properties or improvements in the vicinity and zone in which the subject property is located." SCC 40.43B.100(3).

A. Neither Application avoids "detriment to the public welfare."

Application 1 claims that "adding height preserves publicly accessible and contiguous open space . . . which improves both public welfare and properties in the vicinity." With similar vagueness, Application 2 asserts that "[c]ommunity services such as EMT and site security are programmed for community service building 2, [which] provides safety and security to Point Wells which [*sic*] also serves to enhance community safety, thereby benefiting [*sic*] other property owners in the vicinity."

While these statement do facially assert that BSRE's desired variances will provide some (mostly inward-facing) benefits to the immediate area, the Code does not require that variances "provide one or two public amenities." It requires that variances, considered as a whole, not be detrimental to the public welfare.

For example “preserv[ing] publicly accessible and contiguous open space” is undoubtedly a public benefit. But a variance does not avoid detriment to the public welfare simply by showing that one benefit is provided as part of the project. The use of the Point Wells site as a community park, for example, could provide publicly accessible and contiguous open space without material public detriment. The proposed highrise buildings do not.

Similarly, “enhanced community safety” is indeed a public benefit. But that improved public safety by itself does not mean a lack of detriment to the community. This Code criterion cannot be satisfied by conclusory assertions of one or two public amenities in the project, once constructed. It requires a finding of no public detriment, and is unsatisfied given the lack of any showing that the Applications satisfy this criterion.

B. Similarly, neither Application avoids injury to other vicinity properties.

Similarly, Application 1 recites that its proposal will “*minimize* the view interference [to] neighboring properties,” while Application 2 asserts that the “proposed building height . . . will *minimize* view corridor impacts from [*sic*] adjacent properties.” (italics provided). However, again, this criterion does not require that a variance *minimize* injury to vicinity properties. It requires that a variance “*not*” be injurious to vicinity properties. This requirement is likewise unsatisfied, and cannot be met through conclusory assertions in the Applications.

4. The Applications fail to show that the proposed heights will not adversely affect the comprehensive plan.

The Code’s final requirement is that no variance “adversely affect the comprehensive plan.” SCC 40.43B.100(4). Again, the Applications do not, and cannot, comply with this criterion.

Neither Application cites a single provision of the Comprehensive Plan (the “Plan”). Instead, they assert that the only thing needed to support the comprehensive plan is “allow[ing] for development” at Point Wells (App. 1) and “enhance[ing] safety and transit connections” (App. 2). These statements are not sufficient to satisfy the Code’s prohibition on adverse impact to the Comprehensive Plan.

More specifically, Application 1’s bald assertion that simply “allow[ing] for development” is sufficient to support the Plan dismisses the Plan’s hundreds of carefully-crafted pages of guidance for *efficient, well-designed, pedestrian-friendly* and *transit-connected* development. The Comprehensive Plan is not served, and cannot be served, simply by “allow[ing] for development” alone. If variances were available in all instances where it would “allow for development,” County rules and regulations would have no meaning at all.

The Second Application similarly assumes that unconvincing statements of “enhanc[ed] safety and transit connections” are sufficient to support the Comprehensive Plan. Once again, this reasoning takes an absurdly simplistic approach to community planning in Snohomish County. The Plan requires consideration of multiple factors. If any single benefit, considered alone, could satisfy the Plan and warrant a variance, neither the Plan nor the Code would have any guiding effect.

Transit connections are admittedly a clearer need for this community. That is why the Comprehensive Plan Land Use Policy LU-3.C.7 specifically states for Point Wells that the site's "intensity of development shall be consistent with the level of service standards adopted by the entity identified as providing the service, utility or infrastructure." Unfortunately, the variances proposed in the Applications would not serve this policy. As further described in the Plan and detailed in Snohomish County Planning and Development Services staff recommendation dated April 17, 2018, the current Point Wells proposal "fails to provide acceptable traffic report and assumptions, resulting in noncompliance with concurrency requirements and failure to mitigate traffic impacts," and further fails "to satisfy access to public transportation and transit compatibility." Considering these findings, the applicant's claimed enhancements are as cynical as they are inaccurate.

In summary , because the Applications fail each and every one of the Code's mandatory variance requirements, they cannot—and must not—be approved.

Thank you again for your careful and committed attention to ensuring that the Point Wells Site is developed in full compliance with County requirements.

Very truly yours,
Davis Wright Tremaine LLP



Clayton P. Graham

cc: Joseph and Mary Bundrant